SUPREME COURT, U. S.

JUL 28 1969

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No. 400

In the Supreme Court of the United States

WALTER G. FOWLER
MARGARET FOWLER CLARK
BRAXTON FOWLER,
PETITIONERS

v.

HOUSING AND URBAN RENEWAL AUTHORITY OF THE CITY OF CHARLOTTESVILLE, VIRGINIA

AND

THE CITY OF CHARLOTTESVILLE, VIRGINIA,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE.

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PETITION FOR A WRIT OF CERTIORARI TO THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE.

The Counsel for the Petitioners on behalf of Walter G. Fowler, Margaret Fowler Clark and Braxton Fowler, petitions for a Writ of Certiorari to review the judgment in this case of the Corporation Court of the City of Charlottesville, Virginia.

OPINIONS BELOW

The Corporation Court did not write an opinion. The Supreme Court of Appeals of Virginia denied a petition for a Writ of Error without opinion.

JURISDICTION

The Judgment of the Supreme Court of Appeals denying the writ of Error was entered on April 29, 1969. The Jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT OF FACTS

The property which is the subject of the present suit is a tract of approximately .7 acres on the South side of Main Street in the City of Charlottesville, Virginia. The property is across Main Street from a tract of approximately 20 acres which was the original Vinegar Hill Urban Renewal Project area.

That project was begun in December, 1958. Acquisition of property was begun in July, 1962 and completed in January, 1965.

In the latter part of 1964 the Charlottesville Redevelopment and Housing Authority began consideration of acquisition of the tract of .7 acres with which this suit is concerned, and on December 1, 1964 the authority authorized the consultant firm it had employed to proceed with the amendment of the plan to include the area of .7 acre.

The study and report of the consulting firm as to the condition of the area were made in February, 1965. On September 8, 1966, the Authority passed its resolution finding the area to be blighted within the meaning of the Virginia Statute and authorizing its taking for urban renewal purposes.

In June, 1967, the City Council of Charlottesville approved the plan submitted by the authority for the proposed project area, which included the tract of .7 acre with which the present suit is concerned.

There is a conflict in the evidence as to the physical condition of much of the tract of .7 acre and its effect if any on the health safety moral, or welfare of the community.

However it is uncontroverted that the building on parcel 1 was admitted by defendants witness to be sound (R. 264), and that over half the area is unoccupied by buildings (R. 86).

It is also not disputed that between February, 1965 and September, 1966, a number of changes took place in the project area. One building characterized by defendants witness as dilapidated has been removed and the lot paved. (R. 337) Other changes are described in the Record at pages 333 and 335.

The original 20 acre tract was razed prior to April, 1965 and there were no buildings on it from that time.

The Petitioners filed suit in the Corporation Court of the City of Charlottesville asking that the action of the Authority in taking the land be enjoined on the grounds that such action was arbitrary and unreasonable. After hearing the evidence in the case the Court found for the Respondents and from that decision the Petitioners asked for a Writ of Error from the Supreme Court of Appeals of Virginia. The Petition for the Writ of Error was refused.

MANNER OF RAISING QUESTION

The question of the validity of the Authority's determination was generally raised in Paragraph 7, Amended Bill of Complaint, and more specifically raised by objections to use of the consultants report as the basis for the Authority's decision on the grounds that the Authority acted upon the report improperly and that the report was too remote in time to be the only basis for proper action by the Authority (see Transcript pages 261, 263, 265-66 and 520).

RIGHT CLAIMED

It is the contention of the Petitioners that the taking by the Authority constitutes a taking without due

process of law and in violation of Petitioners' rights under the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED:

(1) Was the decision of the Redevelopment Authority as to the condition of the 7/10 of an acre so arbitrary and unreasonable as to constitute violation of due process?

(2) Were the actions of the Redevelopment Authority and the method by which it reached a determination arbitrary and unreasonable and therefore a violation of due process?

QUESTION 1

This Court in *Morgan* v. *U. S.*, 298 U.S. 468 has pointed out that administrative proceedings which require the taking and weighing of evidence, a determination of facts based on the evidence and the making of an order supported by the finding resembles a judicial proceeding and carries with it a duty that fundamental judicial requirements will be met. One of those requirements is that there must be evidence to support the pertinent and necessary findings of fact.

It is the contention of your Petitioner that the evidence which was presented to the Redevelopment Authority was insufficient to support the finding which the Authority made and that the finding is therefore arbitrary and unreasonable and constitutes a taking of property without due process.

If we turn to a review of the evidence and the requirements set by the Supreme Court of Appeals of the Commonwealth of Virginia we find first that the criteria for determining the presence of absence of blight in a particular area are set out in Virginia Code (1950) Section 36-49. A blighted area is one.

> "With buildings or improvements which by reason of dilapidation, obsolescense, over crowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these and other factors are detrimental to the safety, health, morals, or Welfare of the Community."

The existence of these conditions is the basis for the authority's power to acquire the property by eminent domain. *Housing Authority* v. *Denton*, 198 Va. 171, 178 (1956) (Hereinafter cited as *Denton*). Under the terms of the statute the Authority is to make the determination of blight, Denton at 177, and that determination is presumed to be valid unless it can be shown that the determination is arbitrary and unwarranted. *Runnels* v. *Housing* Authority, 207 Va. 407, 413 (1966). (Cited hereinafter as *Runnels*).

The two cases cited above are the only cases in Virginia which have dealt with the question of the correctness of a redevelopment authority's determination of blight in a particular area. In those cases the Court set out certain questions which it felt should be answered satisfactorily by the evidence before the Authority before a finding of blight is warranted.

The first of these is that the condition of the area will be considered as a whole and that is the controlling factor in the determination not the condition of isolated structures within the area. It was established at trial that the entire area in question is composed of some 32,800 square feet broken down into eight parcels. Of that 15,420 square feet of the property is paved, with an additional 1,708 square feet which is unoccupied by improvements. Transcript 62. Another parcel of 4,700 feet is covered by a building which both plaintiff's and defendant's witnesses agreed was not blighted. Transcript 65-66 and 333-334. The evidence of

the defendant's witnesses is particularly crucial since these witnesses are members of the same consulting firm which reported to the Redevelopment Authority and the evidence that they gave at trial was the evidence which they gave to the Authority.

Runnels adds several other questions to the one set out in Denton. The Court in that case pointed out the importance of

> "the evidence relating also to the question of whether the dilapidated or 'run-down' condition of the area was 'detrimental to the safety, health, morals, or welfare of the community' within the meaning of Code Section 36-49." *Runnels*, 412.

The evidence given by Respondent's witness, Carl Muse, is particularly interesting. As the building inspector for the City, this witness had the responsibility for seeing to it that the building code was complied with. He testified that he had given no citations in the area since 1965. Transcript 435. There would therefore be some question as to the seriousness of any claim that the area was detrimental to the safety of the community and in deed the Respondents did not pursue the point very far.

The Respondent's attempted to show two kinds of detriment to the welfare of the community. One was a sort of general detriment by the fact that the property occupies the western approach to Charlottesville, Transcript 607, and that the businesses in the area were termed "marginal" and "short term", Transcript 546. Aside from the fact that two of the businesses had been in the area for over 20 years, Transcript 140 and 160, and another had moved in approximately 4 years earlier and had recently bought the property on which it stood, Transcript 219, there was a good deal of testimony that the presence of urban renewal across the street and the fact that there had been several statements that the area was to be taken, made the proper-

ties in the area very difficult to rent. Transcript 198, 217. Obviously any area as unsettled as this had been for several years before the date of the inspection by the Authority is going to be difficult to rent to any but very small, marginal businesses.

The evidence of economic detriment was limited to a showing of the gain or loss of appraised value for real estate taxes in this area. The record shows that appraised value has in fact decreased in the area.

However, the record also shows that the entire downtown area had decreased in value over the same period of time. Transcript 479. The records also shows a significant difference between the value of the area and the value of a neighboring block. Transcript 481. It should be noted that this block is covered entirely by two large stores which are part of national chains. This could hardly be considered a fair comparison. Petitioners contend that if this area were compared to another like it, that is an area bordering or close to the original area of urban renewal demolition and made up of small or medium size buildings large enough for specialty type stores, the two areas would show similar decreases in value. The overall decrease in values in the entire downtown area is a clear indication that the primary reason for the decrease in the area here under consideration is the same as it is for the rest of the downtown: competition from new and more convenient shopping centers. The decrease of value in this area and in the downtown is not evidence of economic detriment but a realignment of values in light of the downtown's loss of its status as the only large shopping and business district in the area. The most telling argument against the contention that the area is an economic detriment to the community is that the Authority never considered any evidence on that factor before reaching its decision on the presence or absence of

blight in the area. Transcript 446-497. It would be improper, indeed impossible, to allow the Authority to attempt to justify its findings on the basis of evidence which it did not consider itself before reaching its decision.

In summary the Petitioners contend that the decision of the Authority was not supported by adequate evidence under the criteria laid down by the courts of this State and that said decision is therefore arbitrary and unreasonable and constitutes a taking of property without due process of law. Even if the evidence which the Authority considered is viewed most favorably less than half of the area can be considered blighted. There was no evidence before the Authority as to the economic or moral detriment or danger to the health or safety of the Community. The Authority apparently never considered these questions, which the courts have clearly stated are matters to be considered before the Authority can make a proper finding. Petitioners contend that this is clearly a finding which is unsupported by the evidence which it requires. In the words of the Court in *I.C.C.* v. *Louisville and N. R. R.*, 227 U. S. 88, it is "arbitrary and baseless."

QUESTION 2

Petitioners further contend that the procedure set up by the Authority and by which it reaches its decision is itself arbitrary and constitutes a failure of due process. As was pointed out in a dissenting opinion in *Snyder* v. *Massachusetts*, 291 U. S. 123 the guarantee of the Eleventh Amendment is not just that a just result will be obtained but that the result shall be reached in a fair way. This Court has stated before that parties affected by a determination of an administrative body have the right to insist on compliance with the requirements of due process. *Shield* v. *Utah*, L. & C. R. R., 305 U. S. 177. Facts and circum-

stances which the administrative agency ought to consider in reaching its decision must not be excluded. *Morgan* v. *U. S.*, op. cit. *Baltimore & O. R. R.* v. *U. S.*, 264 U. S. 258, *United States* v. *Abilene* and S. R. R., 265 U. S. 274, *Florida* v. *U. S.*, 282 U. S. 194. Persistent disregarded of known conditions which are essential to an adequate assessment of the situation by the administrative agency is arbitrary *Great Northern R. R.* v. *Weeks*, 297 U. S. 135.

The record shows that the Authority ordered the study and inspection in late 1964. Transcript 240. In February of 1965 the inspection and study was made and the consulting firm made a report available to the Authority that same month. Transcript 243. The Authority did not make a determination on the study until September of 1966, Transcript 247, and it was not presented to the City Council until 1967. Transcript 253.

During this period extensive changes had been made within the area. One of the buildings was torn down and the lot paved. Another lot was repaved, Transcript 337. Other buildings were changed and partially dismantled, Transcript 335. There were changes in the character of the businesses in the area with some moving out, others moving in. Transcript 333. Throughout the area these changes were being made yet, for purposes of the study, the area remained unchanged. None of these changes were reported to the Authority and no followup studys were ordered to ascertain whether the area's condition was in any way changed. This was done in spite of the fact that there was a lapse of a year and a half between the time that the Authority received the evidence and the time that they reached a decision on that evidence.

There was no attempt to ascertain whether the essential factors of detriment to the health, safety, welfare, and morals of the community were present nor was there any attempt by the Authority to cross check any of the

information which it had at hand, which clearly should have been done, as an examination of the record will show. In testimony concerning one of the parcels Respondents witness listed several major objections. His first was that the ceiling of the building was cracked and warping. Transcript 335. In direct testimony the owner stated the ceiling plaster had peeled and cracked, and that he had repaired to the satisfaction of the State Inspector. Transcript 142. Respondents witness stated that the light fixtures were drop cords. Transcript 335. The owner stated that he had neon light fixtures in the ceiling with one drop cord to the scales, Transcript 145, and on cross examination the Respondent's witness reversed himself and agreed with the owners testimony. Transcript 352-53. The Respondent's witness also stated that there were masonry cracks in the building's walls and that the wall was out of plumb. Transcript 335. Testimony by another engineer however was to the effect that there were no structural cracks in the wall, that it was probably laid out of plumb and that as it was not a bearing wall, it created no problem. Transcript 627. It is important to note that none of the above information, except the evidence of Respondent's witness was before the Authority when it made its decision.

There is no evidence that the Authority made any attempt to check the report of the consulting firm from discrepancies, and many appeared at trial after the decision of the Authority. The Authority called no other witnesses, nor did it attempt to gather any other information except what was put before it by the consulting firm which it had hired. Petitioners contend that this is clearly a case where information which should have been considered was not and where an administrative body has ignored facts which it should have considered before making a factual assessment of the presence or absence of blight.

The rule as stated in Denton also lays down the requirement that the condition of the area must in fact represent a

threat to the health, safety, morals, and welfare of the community. Petitioners have shown by testimony of their own witnesses and cross examination of the defendant's witnesses that the Authority failed to make such a determination. In fact, there is nothing to indicate that the Authority even considered any evidence on the question. Certainly the report which the consulting firm placed before the Authority does not deal with it. The only evidence at trial was evidence which the Authority apparently did not have before it when it made its decision. The Health Inspector stated that he had only minor complaints in the area, Transcript 447-450, and the Building Inspector testified that he had none at all. Transcript 434. As already stated the City Assessor testified that the Authority had not made any inquiry as to possible downgrading of the area economically. The evidence thus shows that the Authority failed in its duty to observe due process by failing to consider all the evidence that it was supposed to consider before it made a finding of fact.

The Authority has failed in its duty as a fact finder in several respects. It made its decision of the basis of out of date information in the face of several basic charges in the area. It made no attempt to update the evidence which it had received before it made its decision. The Authority made no attempt to obtain evidence from any other quarter besides a consulting firm which it had hired, nor did it attempt to cross check that information. Further, the Authority made no attempt to gather any information on the essentials factors of detriment to the community. All of these facts indicate that the decision of the Authority was an arbitrary one made on the basis of out of date, insufficient evidence and clearly represents a taking without due process.

CONCLUSION

This Court has held in opinion after opinion that administrative bodies are required to act in accordance with due process before they may take property from an individual. The demand of due process as pointed out in *Nebbia* v. *New York*, 291 U. S. 502 is that the laws should not be unreasonable, arbitrary or capricious. To that we may add that the same requirement extends to the administration of the law. Petitioners contend that the Authority failed to observe due process in two respects. First, that the decision which the Authority made was clearly unsupportable by the evidence which it had before it in light of the requirements set by the Courts of this State. Second, that the manner by which the Authority reached its decision prevented the inclusion of certain essential evidence which the Authority had to have in order to reach a decision under the law. The decision which the Authority reached is arbitrary and capricious and constitutes a taking of property without due process. That decision should be declared without effect.